SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

DESERT BRANCH (INDIO)

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. SERGIO LOPEZ-GUZMAN, ET AL., Defendant.	Case no. INF1500253 **COURT'S ORDER GRANTING NEW TRIAL AS TO COUNT SEVEN AS WELL AS THE CRIMINAL STREET GANG ENHANCEMENTS FOUND TRUE AS TO COUNTS ONE THROUGH SIX (Pen. Code, § 1181, subd. (8).)**

In June of 2018, defendant Sergio Lopez-Guzman was found guilty by a jury of five counts of home-invasion-robbery (Counts 1-5) and one count of second-degree robbery (Count 6). (Pen. Code, §§ 211, 212.5, subd. (c), 213, subd. (a)(1)(A).) As to all six counts, the jury found true criminal street gang and firearm allegations. (Pen. Code, §§ 186.22, subd. (b), 12022.53, subd. (b).) The jury further found the defendant guilty of being an active participant in a criminal street gang (Count 7). (Pen. Code, § 186.22, subd. (a).)

Throughout the trial, Cathedral City police officer Alfredo Luna was present at counsel table with the prosecutor. He also participated in a police vehicle pursuit of the defendant and his accomplices on the night of the robberies, February 7, 2015. Of greatest importance here, Officer Luna testified as the prosecution's gang expert and he did so at length. While other officers also testified about the defendant's and his accomplices'

connections to a street gang, only Officer Luna opined that "Barrio Dream Homes" is a criminal street gang *under the law* as opposed to its mere reputation in the community. (Pen. Code, § 186.22, subd. (f).) Further, only Officer Luna testified that the crimes of which the defendant has been convicted were committed for the benefit of, at the direction of, and in association with a criminal street gang, and with the intent to promote, further, and assist in criminal conduct by gang members. (*Id.* at subd. (b).) Finally, only Officer Luna testified that the defendant had "actively participated" in a criminal street gang, a necessary element for Penal Code section 186.22, subdivision (a), the charge in Count 7.

Approximately two weeks after the guilty verdicts, the People informed defense counsel that they had been notified of potential impeachment evidence regarding Officer Luna. A series of continuances ensued during which time several disclosures by the People to the defense were made subject to protective orders. The defendant also brought a *Pitchess* motion as to Officer Luna and pursuant to that motion, an in camera hearing was held. (See *Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531, 113 Cal.Rptr. 897, 522 P.2d 305, see also *Long Beach Police Officers' Assn.* v. *City of Long Beach* (2014) 59 Cal.4th 59, 172 Cal.Rptr.3d 56, 325 P.3d 460.) At the conclusion of the in camera hearing, disclosures were ordered.

On January 1, 2019, Senate Bill 1421 ("SB 1421") took effect. Its precise parameters and its effect on California law need not be described in detail herein. Suffice it to say, SB 1421 has resulted in public disclosure of the fact that in 2018, Officer Luna was disciplined by his department for allegedly falsifying a time card. Whatever the merits of that allegation, it is undisputed that its investigation and sustained findings resulted in Luna's

removal from the gang unit.[1] Luna's forced removal from the gang unit occurred after the preliminary hearing in this case (at which Luna testified) but before the trial. Of great importance here, Officer Luna's forced departure from the gang unit was not made known to the defense in advance of trial and was not made known to the jury. Apparently the People were never notified of the time card-related discipline, therefore they never disclosed it.

In February 2019, the defendant through counsel brought a motion for new trial as to the gang enhancement only. In September 2019, the defendant further moved for a new trial as to Count Seven, the charge of active participation in a criminal street gang. (Pen. Code, § 186.22, subd. (a).) The People have opposed the motions notwithstanding their failure, innocently enough, to both discover and disclose the alleged time card-related misconduct and discipline at issue.

Unlike a murder case in which the defendant is the actual killer and the gang enhancement adds no additional custodial time (see *People* v. *Hernandez* (2005) 34 Cal.4th 1002, 22 Cal.Rptr.3d 869, 103 P.3d 270), the gang enhancement in this case is of paramount importance. Instead of facing 19 years in prison on each of the home-invasion robbery counts (taking into account the firearm enhancement), the defendant here faces 15 years *to life* in prison plus ten additional years (firearm enhancement) for each home-invasion robbery if the gang enhancement is imposed. (Pen. Code, §§ 186.22, subd. (b)(4)(B), 1168, subd. (b), 1170, 1170.1.) Further, the defendant faces ten additional years in prison for the lone count of second-degree robbery

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[1] The Court has been informed that the alleged time card-related misconduct by Officer Luna is separate and distinct from the alleged impeaching evidence provided by the People to the defense shortly after the guilty verdicts.

(Count 6) if the gang enhancement is imposed on that count. (Pen. Code, § 186.22, subd. (b)(1)(C).) To put it lightly, the criminal street gang enhancement in this particular case bears enormous significance.

Returning to a discussion of the importance of Officer Luna's testimony, it must be noted that Luna alone testified about the conglomeration of the following necessary elements of the gang enhancement, as well as the crime of active participation in a criminal street gang:

1. Barrio Dream Homes ("BDH") is an ongoing organization or association.

2. BDH has three or more members.

3. BDH has a common name, sign, or symbol.

4. The primary activities of BDH include the commission of crimes listed in subdivision (e) of section 186.22 of the Penal Code.

   AND

5. The members of BDH have engaged in a "pattern of criminal gang activity" as that phrase is defined by the statute and by case law.

(Pen. Code, § 186.22., subds. (b), (e)-(f); CALCRIM no. 1401.) Thus, it is important to note that the so-called STEP Act[2] first requires proof that there is in fact a criminal street gang *before* a crime can be found to have been committed for that gang's benefit. While the Court agrees with the People that substantial evidence was adduced at trial establishing defendant's connection to BDH, that evidence is only part of the necessary equation.

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[2] Street Terrorism Enforcement and Prevention Act of 1988. (Pen. Code, §§ 186.20, et seq.)

Furthermore, it is a significant understatement that California's criminal street gang enhancement is rather technical. For one, it is very difficult if not impossible to prove the gang enhancement without the testimony of an expert witness. (See *People* v. *Vang* (2011) 52 Cal.4th 1038, 132 Cal.Rptr.3d 373, 262 P.3d 531.) Here, the prosecution's gang expert (Ofc. Luna), whose expertise was fleshed out over three consecutive trial days, was never questioned about his forced departure from the gang unit of the Cathedral City police department. At no point did he volunteer the fact that he had been removed from the unit. Nor did the information ever surface on cross-examination. In short, the People, and the officer in particular, were extraordinarily lucky that the information at issue was never made known to the jury. As previously stated, the People were unaware of it. Meanwhile, the officer apparently found a way to withhold the information during his testimony and without committing perjury.

Turning to another prong of California's new trial statute, because *both* the People and defense were unaware of Officer Luna's time-card related discipline, the Court concludes that the defense did not fail to exercise reasonable diligence in failing to discover the information pre-trial. (*See* Pen. Code, § 1181, subd. (a), allowing for a new trial when "new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.") Officer Luna was purportedly a highly-qualified and highly-trained gang expert according to his preliminary hearing and trial testimony. However, he was not a percipient witness to any of the crimes charged against the defendants. He did not testify that defendant Lopez-Guzman was a full-fledged gang member. Instead, Luna testified that the defendant was a mere gang associate, albeit an active one. Further, Luna did not testify to any

incriminating statements made by the defendant. In short, the Court cannot fault the defense for not filing a *Pitchess* motion pre-trial that presumably would have uncovered the impeachment evidence at issue. But the Court also cannot fault the defense, given the events of the last sixteen months, for now pursuing a partial motion for new trial.

Getting down to the crux of the matter, it must be noted that this particular factual setting does not give the Court confidence in the verdicts reached with respect to the gang enhancement and Count Seven. The Court entertains serious doubts that the exact same outcome would have been reached had Officer Luna been confronted with evidence of his alleged time-card transgression. If nothing else, Luna would have had to explain that the alleged incident, true or not, had led to his involuntary departure from the gang unit.

Can it really be said that not one juror would have held out on the gang enhancement and Count Seven had such information been elicited at trial? That is the standard that applies to motions brought pursuant to Penal Code section 1181, subdivision (8). (See *People* v. *Soojian* (2010) 190 Cal.App.4th 491, 521, 118 Cal.Rptr.3d 485, "[The defendant meets his] burden of establishing that a different result is probable on retrial ... if he has established that it is probable that *at least one juror* would have voted to find him not guilty had the new evidence been presented." [italics added.]) Unlike the People, the Court cannot confidently conclude that the undiscovered information would have made no difference to the outcome. To the contrary, the Court has repeatedly pondered the distinct possibility that had the People known of the information at issue, they would not have called Officer Luna as an expert. After all, and as represented previously to the Court by the People, there were other officers who could have testified to the necessary

elements of section 186.22. And lest it be said that Luna's testimony was insignificant in the grand scheme of trial, it must be noted that the prosecutor referred to Luna by name on seven occasions during closing argument, just as any competent advocate would have done.

In conclusion, granting the defendant's motion for new trial does not mean that the defendant will never face the extreme sanction imposed by the gang enhancement. Instead, it means that another jury will have to be convinced that the enhancement is true beyond a reasonable doubt and that the defendant is guilty of Count Seven. This hypothetical second trial should be simpler than the first. After all, the hypothetical second jury should be informed that the defendant has already been found guilty of six counts of robbery and that their only duty is to determinate the truth, if any, of the gang enhancement and Count Seven. (See *People* v. *Anderson* (2009) 47 Cal.4th 92, 119-123, 97 Cal.Rptr.3d 77, 211 P.3d 584, holding that retrial of a conduct enhancement does not require retrial of the underlying crime(s).)

In short, the Court cannot help but err on the side of caution in this matter and grant the defendant's motion for new trial as to the criminal street gang enhancement as well as Count Seven. All other convictions and true findings shall remain in place.

IT IS SO ORDERED.

DATED: OCT. 9, 2019

Hon. Russell Moore, Judge
Superior Court of California
County of Riverside
Desert Branch, Dept. 1A